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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1239

FIRST NATIONAL BANK OF AKRON,
Petitioner,

vs.

THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *et al.*,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT JAMES BLOOR AS TRUSTEE OF INVESTORS FUNDING CORPORATION OF NEW YORK

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Table of Contents

	PAGE
Brief in Opposition of Respondent James Bloor as Trustee of Investors Funding Corporation of New York	1
Opinions Below	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
This Case Presents no Basis for Certiorari	4
Transfer of this Action Meets the Statutory Prerequisites of Section 1407	6
Under the Plain Language of Section 1407 Every "Civil Action" Includes Actions Involving National Banks	8
The Legislative History of Section 1407 Mandates its Application to Akron Bank	9
Granting the Writ would Vitiate the purpose of Section 1407	10
The Two Statutes are Not in Conflict and May be Harmonized	11
If There is Any Conflict Between 28 U.S.C. § 1407 and 12 U.S.C. § 94 for the Limited Purpose of Transfer for Pretrial Proceedings, 28 U.S.C. § 1407, not 12 U.S.C. § 94, is Controlling	15
Conclusion	17
Appendix	A-1

Table of Authorities

Cases:

Bank of Bethel v. *Pahquioque Bank*, 81 U.S. 383, 14 Wall 383 (1871)	14
Citizens and Southern National Bank v. *Bougas*, 46 U.S. Law Week 4001 (Sup. Ct. 1977)	13
Continental Grain Co. v. *Barge FBL-585*, 364 U.S. 19 (1960)	6, 8

	PAGE
Ex parte Collett, 337 U.S. 55 (1949)	8
Ex parte Fahey, 332 U.S. 258 (1947)	5
First Nat. Bank & Trust Co. v. *Am. Sec. & Trust Co.*, 437 F.Supp. 771 (D. D.C. 1977)	13
First National Bank v. *Union Trust Co.*, 244 U.S. 416 (1917)	14
In re Aviation Products Liability Litigation, 347 F.Supp. 1401 (JPML 1972)	11
In re Equity Funding Corporation of America Securities Litigation, 416 F.Supp. 161 (C.D. Cal. 1976)	7
In re Falstaff Brewing Corp. Antitrust Litigation, 434 F.Supp. 1225 (JPML 1977)	4, 5, 7, 13
In re Great Western Ranches Litigation, 369 F.Supp. 1406 (JPML 1974)	4, 5, 7
In re Hotel Telephone Charge Antitrust Litigation, 341 F.Supp. 771 (JPML 1972)	6, 11
In re Investors Funding Corporation of New York Securities Litigation, 437 F.Supp. 1199 (JPML 1977)	2, 4, 6
In re Kauffman Mutual Fund Actions, 337 F.Supp. 1337 (JPML 1972)	4, 7, 11
In re Multidistrict Litigation Involving Banking Agreements with Stirling Homex Corporation, 388 F.Supp. 572 (JPML 1975)	7
In re National Student Marketing Litigation, 413 F.Supp. 1159 (D. D.C. 1976)	7
In re New York City Municipal Securities Litigation, 439 F.Supp. 267 (JPML 1977), *mand. denied*, —— F.2d —— (2nd Cir. March 2, 1978)	7, 10, 15, 16
In re Panty Hose Seaming Patent Litigation, 402 F.Supp. 1401 (JPML 1975)	11
In re Pittsburgh and Lake Erie Railroad Company Securities and Antitrust Litigation, 374 F.Supp. 1404 (JPML 1974)	7
In re Truck Accident Near Alamagordo, New Mexico, 387 F.Supp. 732 (JPML 1975)	15
In re Westec Corporation, 307 F.Supp. 559 (JPML 1969)	13

	PAGE
Kerotest Mfg. Co. v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952)	8
Leith v. *Oil Transp. Co.*, 321 F.2d 591 (3rd Cir. 1963)	11
Murphy v. *First Nat. Bank of Chicago*, 228 N.W. 2d 372 (Ia. 1975)	14
Posadas v. *National City Bank*, 296 U.S. 497 (1936)	15
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 (1976)	5, 15
Third National Bank in Nashville v. *Impac Limited, Inc.*, CCH Federal Banking L.Rep. ¶ 97, 175 (Sup. Ct. 1977)	9, 10
United States v. *National City Lines*, 337 U.S. 78 (1949)	8
Williams v. *Austrian*, 331 U.S. 642 (1947)	12
Wyndham Associates v. *Bintliff*, 398 F.2d 614 (2nd Cir.), *cert. denied*, 393 U.S. 977 (1968)	8

Statutory Provisions:

12 U.S.C. § 91	10
12 U.S.C. § 94	2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16
15 U.S.C. § 78u(g)	2, 9
18 U.S.C. § 1505	14
28 U.S.C. § 1291	5
28 U.S.C. § 1292	5
28 U.S.C. § 1404	9
28 U.S.C. § 1404(a)	6, 8, 9
28 U.S.C. § 1406(a)	9
28 U.S.C. § 1407	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16
28 U.S.C. § 1407(g)	9
28 U.S.C. § 1407(h)	9
28 U.S.C. § 1446	14
46 U.S.C. § 185	14

Miscellaneous:

	PAGE
House Report No. 1130, U.S. Code Cong. & Adm. News 1898 (1968)	9, 10, 11, 16
1 Moore's Federal Practice ¶ 0.144[2.-1] (2nd ed. 1977)	7
Report of the Co-Ordinating Committee of the Judicial Conference on Multiple Litigation Recommending New Section 1407, Title 28, reprinted at 298 F.Supp. 498	9
Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, to accompany S.249, U.S. Govt. Printing Office 1975	10

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BRIEF IN OPPOSITION OF RESPONDENT JAMES BLOOR AS TRUSTEE OF INVESTORS FUNDING CORPORATION OF NEW YORK

This brief is submitted on behalf of respondent James Bloor, as Reorganization Trustee ("Trustee") of Investors Funding Corporation of New York and 33 related entities ("IFC") pursuant to Chapter X of the Bankruptcy Act in opposition to the petition of First National Bank of Akron ("Akron Bank") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (P-A-13)[1] denying petitioner's petition for a writ in the nature of certiorari and mandamus to the Judicial Panel on Multidistrict Litigation ("Multidistrict

1. References beginning with P are to pages in Akron Bank's petition and P-A to the Appendix therein. Page references beginning with A are to the Appendix herein.

Panel") is not reported. The Multidistrict Panel's opinion is reported at 437 F.Supp. 1199 (JPML 1977).

QUESTIONS PRESENTED

1. Whether Congress intended to add the phrase "except civil actions involving national banks" when it enacted 28 U.S.C. § 1407 providing "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings"?

2. Was the Court of Appeals correct in refusing to reverse by extraordinary writ the Multidistrict Panel's discretionary transfer pursuant to Section 1407 of the Trustee's action against Akron Bank together with six other actions involving common questions of fact to the Southern District of New York for the purposes of coordinated or consolidated pretrial proceedings when the Multidistrict Panel found the transfer would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation?

STATUTES INVOLVED

The full texts of 28 U.S.C. § 1407, 12 U.S.C. § 94 and 15 U.S.C. § 78u(g) are set forth in the appendix.

STATEMENT OF THE CASE

The IFC reorganization proceedings are pending in the Southern District of New York. IFC has approximately 8,000 stockholders and approximately 27,000 debenture holders. There are approximately $227 million creditor claims which may be asserted in the reorganization proceedings against IFC's assets of approximately $70 million.

Following an investigation, the Trustee commenced an action in the Southern District of New York pursuant to, *inter alia*, the federal securities laws and bankruptcy laws against certain of IFC's officers, directors, accountants, a consortium of banks, attorneys and others. Akron Bank is a defendant in the Southern District of New York action. As a precaution, the Trustee filed four identical complaints against Akron Bank and three national banks in the consortium in the districts in which each was established so as to protect IFC's creditors in the event the four national banks established outside the Southern District of New York successfully moved to dismiss the Southern District of New York action pursuant to the venue provisions of 12 U.S.C. § 94.

The Trustee alleged in all of the actions that a consortium of banks (including four national banks established in New York) used inside information to their benefit and to the detriment of IFC and its creditors, and that Akron Bank, a recipient of this inside information from the banking consortium, used this inside information and fraudulently transferred IFC funds to Akron Bank. As recognized by the Multidistrict Panel:

> "[A]ll seven[2] actions, including the Akron bank action, involve substantial common questions of fact concerning the financial condition of IFC. In addition, *Bloor* and the Virginia, Illinois and District of Columbia bank actions share questions of fact concerning the alleged collective activities of the banks and others in regard to IFC and the effect of those activities upon IFC, other creditors of IFC and other interested persons. Transfer under Section 1407 will therefore eliminate duplicative discovery, avoid the possibility of conflicting pretrial

2. Two separate class actions on behalf of IFC stockholders and debentureholders were pending in the Southern District of New York.

rulings and conserve judicial effort." 437 F.Supp. at 1202.

Accordingly, the Multidistrict Panel granted the Trustee's motion pursuant to 28 U.S.C. § 1407 for transfer to the Southern District of New York of the four actions pending outside that district for coordinated or consolidated pretrial proceedings. *In re Investors Funding Corporation of New York Securities Litigation,* 437 F.Supp. 1199 (JPML 1977). The Multidistrict Panel quoted with approval its opinion in *In re Falstaff Brewing Corp. Antitrust Litigation,* 434 F.Supp. 1225 (JPML 1977):

> "'In considering transfer under Section 1407, the Panel is not encumbered by considerations of venue, including those under 12 U.S.C. § 94. *In re Great Western Ranches Litigation,* 369 F.Supp. 1406, n.1 (J.P.M.L. 1974). The fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent transfer of the actions against them to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied. *In re Kauffman Mutual Fund Actions,* 337 F.Supp. 1337, 1339 (J.P.M.L. 1972). Indeed, 28 U.S.C. § 1407(a) states that 'actions may be transferred to *any district* for coordinated or consolidated pretrial proceedings.' (Emphasis added.)'" 437 F. Supp. at 1202-1203.

Akron Bank and three other banks petitioned the Second Circuit for an extraordinary writ in the nature of certiorari and mandamus which was denied.[3]

THIS CASE PRESENTS NO BASIS FOR CERTIORARI

Akron Bank's petition does not meet any of the criteria for granting certiorari. Supreme Court Rule 19.

3. The three other national banks have *not* petitioned for certiorari. (Emphasis added throughout unless otherwise indicated.)

There is no conflict between circuits. In fact, judges representing eight of the ten circuits have participated in Multidistrict Panel decisions and agreed that the venue provisions of Section 94 do not preclude transfer under Section 1407 since the latter is not encumbered with venue considerations. *In re Falstaff Brewing Corp. Antitrust Litigation,* 434 F.Supp. 1225 (JPML 1977); *In re Great Western Ranches Litigation,* 369 F.Supp. 1406 (JPML 1974). There is no conflict between Section 94 and Section 1407. If there is a conflict it has been fully resolved by the Multidistrict Panel and Section 1407 clearly takes precedence.

Although Akron Bank claims that the Multidistrict Panel has decided a federal question in conflict with applicable decisions of this Court, no such conflict in fact exists. *Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148 (1976), is not in conflict with this case. *Radzanower* held that the narrower venue provision of the National Bank Act prevailed over the broader venue provision of the Securities Exchange Act. Section 1407 is not encumbered by venue considerations and applies only after commencement of the action.

No important question of federal law has been decided which should be decided by this Court, rather judges representing eight circuits have consistently interpreted a Congressional statute in accordance with its plain language and purpose and the Second Circuit has refused to find this interpretation an abuse of discretion.[4]

4. Contrary to Akron Bank's assertion, the possibility of summary judgment in the transferee court is not a reason to grant the writ. Piecemeal review has been strictly circumscribed by Congress, 28 U.S.C. §§ 1291, 1292. The appropriate time for Akron Bank to appeal from summary judgment *against* it is *after the judgment* has been granted, not *prior* to the time a motion for summary judgment has been made. It is established that "extraordinary writs" cannot be used "as substitutes for appeals." *Ex parte Fahey,* 332 U.S. 258, 260 (1947).

TRANSFER OF THIS ACTION MEETS THE STATUTORY PREREQUISITES OF SECTION 1407

The Multidistrict Panel correctly held that transfer of the actions involving IFC "will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." 437 F.Supp. at 1201. The Multidistrict Panel determined that this action is one "of seven actions pending in five federal districts . . . [A]ll seven actions, including the Akron bank action, involve substantial common questions of fact concerning the financial condition of IFC. . . . Transfer under Section 1407 will therefore eliminate duplicative discovery, avoid the possibility of conflicting pretrial rulings and conserve judicial effort." 437 F.Supp. at 1199, 1202. The Second Circuit refused to find this determination an abuse of discretion.

This Court has recognized similar criteria under Section 1404(a):

> "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Continental Grain Co.* v. *Barge FBL-585,* 364 U.S. 19, 26 (1960).

The Multidistrict Panel rejected Akron Bank's contention that special venue statutes preclude transfer pursuant to Section 1407. This holding is consistent with its statutory mandate and prior determinations. "Venue is not a criterion in deciding the propriety of transfer under Section 1407." *In re Hotel Telephone Charge Antitrust Litigation,* 341 F.Supp. 771, 773 (JPML 1972). "Defendants' . . . argument is that Kauffman should not be able to secure from the Panel, under 28 U.S.C. § 1407, what the venue provisions of federal law otherwise prohibit. However,

the Panel's discretion under Section 1407 is not limited by venue considerations and the fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent their transfer to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied." *In re Kauffman Mutual Fund Actions,* 337 F.Supp. 1337, 1339 (JPML 1972).

The Multidistrict Panel as well as other courts and commentators have repeatedly recognized that Section 1407 is applicable to national banks. In *In re Great Western Ranches Litigation,* 369 F.Supp. 1406 (JPML 1974), the Multidistrict Panel transferred pursuant to § 1407 a case involving a national bank which earlier had been severed and transferred to the district where it was established pursuant to 12 U.S.C. § 94. As the Multidistrict Panel noted, "The operation of 12 U.S.C. § 94 does not preclude transfer under 28 U.S.C. § 1407 because the latter is not encumbered by venue considerations." 369 F.Supp. at 1406, fn. 1. For other Section 1407 transfers involving national banks, see, *In re Pittsburgh and Lake Erie Railroad Company Securities and Antitrust Litigation,* 374 F.Supp. 1404 (JPML 1974); *In re Multidistrict Litigation Involving Banking Agreements with Stirling Homex Corporation,* 388 F.Supp. 572 (JPML 1975); *In re Falstaff Brewing Corp. Antitrust Litigation,* 434 F.Supp. 1225 (JPML 1977); *In re New York City Municipal Securities Litigation,* 439 F.Supp. 267 (JPML 1977); *In re Nat. Student Marketing Litigation,* 413 F.Supp. 1159, 1161 (D.D.C. 1976).

As stated by Professor Moore, "Section 94 of Title 12 does not preclude transfer under 28 USC § 1407 for consolidated pretrial proceedings, since that section operates independent of venue considerations." 1 Moore's Federal Practice ¶0.144[2.-1] at p. 1478 (2nd ed. 1977). See also, *In re New York City Municipal Securities Litigation,* ___ F.2d ___ (2nd Cir. March 2, 1978) (slip. op. at 1798); *In re Equity Funding Corporation of America Securities*

Litigation, 416 F.Supp. 161, 178-179 (C.D.Cal. 1976); *Wyndham Associates* v. *Bintliff,* 398 F.2d 614, 618-19, fn. 1 (2nd Cir.), *cert. denied,* 393 U.S. 977 (1968).

UNDER THE PLAIN LANGUAGE OF SECTION 1407 EVERY "CIVIL ACTION" INCLUDES ACTIONS INVOLVING NATIONAL BANKS

This action falls within the plain language of 28 U.S.C. § 1407 which provides:

> "When *civil actions* involving one or more common questions of fact are pending in different districts, such actions may be transferred to *any district* for coordinated or consolidated pretrial proceedings."

By analogy, this Court has firmly rejected attempts to limit the reach of the phrase "any civil action" in Section 1404(a). Chief Justice Vinson, speaking for the Court, held that Section 1404(a) applied to actions under the Federal Employers' Liability Act, *Ex parte Collett,* 337 U.S. 55 (1949), and to civil actions brought by the United States under the antitrust laws. *United States* v. *National City Lines,* 337 U.S. 78 (1949). In rejecting an argument identical to that advanced here by Akron Bank, the Court said:

> "The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from 'any civil action.'" 337 U.S. at 58. (footnote omitted)

The Court refused to read into the statute any implied exceptions, even for actions founded upon special statutory grants of venue. *See, e.g., Continental Grain Co.* v. *Barge FBL-585,* 364 U.S. 19 (1960); *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.,* 342 U.S. 180 (1952).

THE LEGISLATIVE HISTORY OF SECTION 1407 MANDATES ITS APPLICATION TO AKRON BANK

Section 1407 clearly is applicable to this case. The Section was enacted after voluntary cooperation between counsel and the judiciary in the electrical equipment antitrust cases. The necessity for the legislation is set forth in the Report of the Co-Ordinating Committee of the Judicial Conference on Multiple Litigation Recommending New Section 1407, Title 28, reprinted at 298 F.Supp. 498, 499-500, "Transfer to the most desirable forum is provided by permitting pre-trial transfer 'to any district.' Present transfer provisions for civil actions, which are not limited to pretrial proceedings, restrict the transferee districts available . . . [to a district] . . . 'where it [the action] might have been brought' . . . [28 U.S.C. § 1404 or] 'could have been brought' [28 U.S.C. § 1406(a)]." If as Akron Bank contends transfer is limited to the district where the action might have been brought under Section 94, then legislation was not required. On the contrary, Section 1407 was enacted because "Existing law is inadequate for such pretrial consolidation, since under 28 U.S.C. 1404(a) transfer is restricted to a district where the action 'might have been brought.'" *House Report No. 1130,* U.S. Code Cong. & Adm. News 1898, 1900 (1968).

Specific exemption from transfer pursuant to Section 1407 is provided for certain antitrust actions brought by the United States, § 1407(g) (A-3-4), and a specific enactment exempted Securities and Exchange Commission ("SEC") equitable proceedings, 15 U.S.C. § 78u(g) (A-4). No exemption for national banks is provided in Section 1407. To read § 1407 to provide such an exemption "would give national banks . . . a privilege unavailable to" other parties. *Third National Bank in Nashville* v. *Impac Limited, Inc.,* CCH Federal Banking

L.Rep. ¶97, 175 at p. 82, 446 (Sup.Ct. 1977).[5] Here, as in *Impac,* "No reason has been advanced for assuming that Congress intended such disparate treatment." *Ibid.* On the contrary, Congress was aware of the limited exceptions to Section 1407. As Congress stated when it enacted S.249, which exempted SEC equitable proceedings from § 1407, "Presently, the law exempts from its operation actions brought by the Department of Justice under the federal antitrust laws." Securities Acts Amendments of 1975, 94th Cong. 1st Sess., Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, to accompany S.249, U.S. Govt. Printing Office 1975, p. 73. "If § 94 was to be preserved from the reach of 28 U.S.C. §1407, a specific exception would have been required. For excellent reasons Congress made none." *In re New York City Municipal Securities Litigation, supra,* ___ F.2d ___ (slip. op. at 1800).

GRANTING THE WRIT WOULD VITIATE THE PURPOSE OF SECTION 1407

Section 1407 was enacted to avoid waves of litigation which threatened to engulf the courts.

> "The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions.
>
> • • •
>
> "The committee believes that the legislation will provide desirable improvements in judicial administration and will assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation." House Report No. 1130, U.S. Code Cong. & Adm. News 1898, 1899, 1901 (1968).

5. In *Impac,* this Court refused to apply 12 U.S.C. § 91 to a state court injunction proceeding against a national bank brought by a debtor seeking to protect its own property from wrongful foreclosure.

Carving out a judicial exception to § 1407 for the venue provisions of § 94 will preclude the efficient handling of many types of actions: those against more than one national bank, those against one national bank and other multidistrict parties, and those brought under other venue statutes.

As indicated above, Section 1407 has been used in at least six other cases involving national banks.

Granting a writ of certiorari in this case to consider whether the special venue section of the National Bank Act precludes application of Section 1407 is an open invitation to virtually every party opposed to transfer pursuant to Section 1407 to claim exemption on the grounds that particular venue statutes render Section 1407 inapplicable.

Cases founded on product liability, *In re Aviation Products Liability Litigation,* 347 F.Supp. 1401 (JPML 1972), the securities laws, *In re Kauffman Mutual Fund Actions,* 337 F.Supp. 1337 (JPML 1972), the antitrust laws, *In re Hotel Telephone Charge Antitrust Litigation,* 341 F.Supp. 771 (JPML 1972), patents, *In re Panty Hose Seaming Patent Litigation,* 402 F.Supp. 1401 (JPML 1975), diversity of citizenship, the Jones Act, *Leith* v. *Oil Transp. Co.,* 321 F.2d 591 (3rd Cir. 1963), all involve particular venue statutes. Any party under any venue statute seeking to avoid transfer has a claim similar to that asserted by Akron Bank. Exclusion from Section 1407 of cases brought under special venue statutes will not "provide desirable improvements in judicial administration." *House Report No. 1130, supra,* U.S. Code Cong. & Adm. News (1968) at p. 1901.

THE TWO STATUTES ARE NOT IN CONFLICT AND MAY BE HARMONIZED

Section 94 designates a district in which an action against a national bank may be brought. This action against Akron

Bank was brought in such district.[6] Section 1407 was enacted to enable the federal court system to handle the multiplicity of lawsuits involving common questions of fact which threatened to inundate the courts. The composition of the Multidistrict Panel was designed to be representative of the federal judiciary and the Multidistrict Panel was vested with broad discretion to determine when transfer for coordinated or consolidated pretrial proceedings is appropriate. One of the guidelines to be considered in exercising this discretion is the convenience of parties and witnesses. This is a determination which must be made by the Multidistrict Panel on a case by case basis, and Section 94 is one, but not the only factor which it may consider. In this case the Multidistrict Panel fully considered Section 94 and determined that the "just and efficient conduct" of seven actions, five against national banks established in different districts, would best be served by transfer to one judge rather than having five or more judges attempt to deal with the same discovery issues.

This Court has held that Section 94 was designed to prevent the transportation of the books and records of a national bank from its home office. As repeatedly recognized by the Multidistrict Panel, nothing in Section 1407 mandates such transportation:

> "defendant national banks need not worry about a transferee court's entering an order requiring that their documents be moved outside their home districts for trial because transfers under Section 1407 are for pretrial only and the actions against them will be remanded to their home districts for trial. *See* Rule 11, R.P.J.P.M.L., 65 F.R.D. 253, 260-63 (1975). Moreover, we note that transfer of an action under Section 1407 does not mean that all discovery

6. It is the Trustee's position that the Southern District of New York action against Akron Bank is properly maintainable in New York pursuant to *Williams* v. *Austrian*, 331 U.S. 642 (1947).

> must take place in the transferee district. For example, depositions of witnesses may still occur where they reside, see Fed.R.Civ.P.45(d)(2), and of course any party may request an order from the transferee court that its documents be inspected at its offices or at another convenient location in or near the city in which it is located, *see Manual for Complex Litigation,* Part I, § 2.50 (rev. ed. 1973)." *In re Falstaff Brewing Corporation Antitrust Litigation,* 434 F.Supp. 1225, 1229-30 (JPML 1977).

In this action all discovery of Akron's books and records has occurred in Ohio. In this age of "improvements in data processing and transportation," *Citizens and Southern National Bank* v. *Bougas,* 46 U.S. Law Week 4001, 4004 (Sup. Ct. 1977), original records may be copied in the bank's home district and transported elsewhere. Section 94 is a factor for consideration by the Multidistrict Panel in its determination of the "convenience of parties", see, e.g., *In re Westec Corporation,* 307 F.Supp. 559, 562 (JPML 1969), but cannot frustrate the Congressional mandate that "civil actions . . . may be transferred to *any* district" by tying the hands of the Multidistrict Panel so as to preclude application to cases involving national banks.

Other courts have held that Section 94 should not be permitted to paralyze the judicial system. As noted in a case holding that Section 94 is not applicable to a counterclaim filed against a national bank, "[T]he purpose of having mandatory counterclaims is to have all related claims adjudicated in a single forum. If 12 U.S.C. § 94 applies to such counterclaims, then the policy will be thwarted for what appears to be no compelling reason. The Court cannot ascribe such an intent to Congress, and concludes that Section 94 does not apply to mandatory counterclaims." *First Nat. Bank & Trust Co.* v. *Am. Sec. & Trust Co.,* 437 F.Supp. 771, 772-73 (D.D.C. 1977).

Akron Bank's argument that pretrial proceedings involving national banks cannot be transferred pursuant to 28 U.S.C. § 1407 because discovery is a "proceeding" is an attempt to exempt national banks from the federal system and creates additional conflicts with other statutes. The extreme position taken by Akron Bank is shown by the inherent impossibility of taking any discovery of third party witnesses who reside outside the district where the bank is established, despite Rule 45 of the Federal Rules of Civil Procedure, if the term "proceedings" encompasses all pretrial proceedings. Akron Bank cites a state court case, *Murphy* v. *First Nat. Bank of Chicago,* 228 N.W.2d 372 (Ia. 1975), allegedly in support of this argument (P-8-9). In fact, the holding in *Murphy* is the opposite. "[W]e are impelled to hold the taking of depositions and submission of interrogatories, at least insofar as they relate to the issue of waiver, are not 'proceedings' under 12 U.S.C. § 94." 228 N.W.2d at 377.

Rather, "proceedings" in Section 94 refers to other types of cases or equitable proceedings. Some proceedings which have involved national banks are "proceedings in the nature of *quo warranto*" or "probate proceedings." *First National Bank* v. *Union Trust Co.,* 244 U.S. 416, 427, 428 (1917). The term proceedings is an alternative to suits or actions, *Bank of Bethel* v. *Pahquioque Bank,* 81 U.S. 383, 14 Wall 383, 395 (1871), and is used as such an alternative in other statutes, *e.g.*: 28 U.S.C. § 1446 ["civil action or proceedings"], 46 U.S.C. § 185 ["claims and proceedings"] and 18 U.S.C. § 1505 ["proceeding pending before any department or agency of the United States"].

IF THERE IS ANY CONFLICT BETWEEN 28 U.S.C. § 1407 AND 12 U.S.C. § 94 FOR THE LIMITED PURPOSE OF TRANSFER FOR PRE-TRIAL PROCEEDINGS, 28 U.S.C. § 1407, NOT 12 U.S.C. § 94, IS CONTROLLING

There is no conflict between 28 U.S.C. § 1407 and 12 U.S.C § 94. If the two statutes are in conflict, Congress, when it enacted 28 U.S.C. § 1407, partially repealed 12 U.S.C. § 94 by implication to the limited extent that the Multidistrict Panel may order transfers of actions involving national banks for coordinated or consolidated pre-trial proceedings.[7]

Repeal by implication has been recognized "where provisions in the two acts are in irreconcilable conflict." *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936), quoted with approval in *Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148, 154 (1976). If 28 U.S.C. § 1407 and 12 U.S.C. § 94 are in "irreconcilable conflict" 28 U.S.C. § 1407 has partially repealed 12 U.S.C. § 94.

The Court of Appeals for the Second Circuit, in an opinion by Judge Friendly, recently decided this specific issue and held, without dissent, that 28 U.S.C. § 1407 had partially repealed 12 U.S.C. § 94. In *In re New York City Muncipal Securities Litigation,* ___ F.2d ___ (2nd Cir., decided March 2, 1978) (slip op. at 1799), the Second Circuit denied a petition for a writ of mandamus to review the Multidistrict Panel's order which transferred two cases

7. None of the cases cited by Akron Bank as allegedly relating to the conflict between § 94 and § 1407 involved § 1407 in any manner. *In re Truck Accident Near Alamagordo, New Mexico,* 387 F.Supp. 732 (JPML 1975) did not involve Section 94 and the Multidistrict Panel has held a bank's reliance upon that case to be misplaced. 437 F.Supp. at 1203.

against a national bank from the District of Massachusetts to the Southern District of New York pursuant to 28 U.S.C. § 1407.

> "On the other hand, the essential purpose of Congress in enacting § 1407 was to permit the centralization in one district of all pretrial proceedings '[w]hen civil actions involving one or more common questions of facts are pending in different districts.' As said in the report of the House Judiciary Committee, '[t]he objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the "just and efficient conduct" of such actions' and '[t]o accomplish this objective the bill provides for *the transfer of venue* of an action for the limited purpose of conducting coordinated pretrial proceedings.' H.R. Rep. No. 1130, 90th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Adm. News 1898, 1899-1900 (1968) (emphasis supplied). As this case illustrates, the need for such centralized management of pretrial proceedings in multidistrict litigation exists equally when national banks are defendants, but could not be met in such cases if 12 U.S.C. § 94 was held to prevent transfer under § 1407. The 'irreconcilable conflict' that signals implied repeal therefore exists. If § 94 was to be preserved from the reach of 28 U.S.C. § 1407, a specific exception would have been required. For excellent reasons Congress made none."___F.2d___(slip op. at 1799-1800).

Thus, any apparent conflict between Section 94 and Section 1407 was properly resolved by the Multidistrict Panel in favor of Section 1407.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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May 5, 1978

APPENDIX

APPENDIX

28 U.S.C. § 1407

§ 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the

panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order

denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include

section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act. As amended Pub. L. 94-435 Sept. 30, 1976, 90 Stat. 1396.

12 U.S.C. § 94

§ 94. Venue of suits

Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

15 U.S.C. § 78 u (g)

Consolidation of actions; consent of Commission

(g) Notwithstanding the provisions of section 1407(a) of Title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission. The term "securities laws" as used herein includes the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and the Securities Investor Protection Act of 1970.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition of Respondent James Bloor as Trustee of Investors Funding Corporation of New York to First National Bank of Akron's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit were served on the following by mailing by first class mail to their respective attorney(s) at the address indicated below:

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I further certify that all parties required to be served have been served.

Dated: May 5, 1978

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